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Supreme Court of the United States

No. 233.

AMERICAN IRON & STEEL MANUFACTURING COMPANY,.....APPELLANT,

versus

SEABOARD AIR LINE RAILWAY AND S. DAVIES WARFIELD, R. LANCASTER WILLIAMS AND E. C. DUNCAN, RECEIVERS OF THE SEABOARD AIR LINE RAILWAY,.....APPELLEES.

ON CERTIFICATE FROM THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR APPELLEES.

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STATEMENT OF THE CASE.

The question which has been certified to this court by the Circuit Court of Appeals for the Fourth Circuit is as to the right of the appellant to recover interest on a cer-

tain supply claim during the period of the receivership. The question was presented on an appeal to the Circuit Court of Appeals from a decree of the late Circuit Court of the United States for the Eastern District of Virginia disallowing interest, rendered in what was known as the Seaboard receivership case, a consolidated cause in that court, entitled "Seaboard Air Line Railway, Complainant, *against* The Continental Trust Company, as trustee under the First Mortgage made by Seaboard Air Line Railway, Defendant; The Continental Trust Company, as trustee under the First Mortgage, made by Seaboard Air Line Railway, Complainant, *against* Seaboard Air Line Railway, The New York Trust Company and Willard V. King, as trustees, and Morton Trust Company and James I. Burke, as trustees, Defendants."

The case is as follows:

The Seaboard Air Line Railway was, and is, a corporation chartered by the states of Virginia, North Carolina, South Carolina, Georgia and Florida, with its lines running through or into each of those states, and also into Alabama. The Continental Trust Company was, and is, the trustee in the railway company's first mortgage. On the 1st day of January, 1908, the railway company filed its bill in the Circuit Court *alleging its insolvency* and consequent inability to maintain itself as a going concern, except through the medium of a receivership, and praying the appointment of receivers. The bill set forth in detail the very large mortgage indebtedness and other liabilities of the company. It averred that its operating expenses and taxes had for some time largely exceeded its earnings, and that the company was left with liabilities which under the then conditions it was unable to meet. In regard to insolvency, it was averred, among other things, that the interests of all

the creditors and stockholders of the company demanded that its property be protected from disintegration as the result of numerous suits in the courts of the above mentioned states that would otherwise inevitably follow at an early date the conditions stated in the bill, with the resulting questions of forfeitures, deficiencies and other incidents attending default in the company's obligations; that the business of the company could be preserved only by the appointment of receivers acting under the authority and direction of a court of equity; that the interests of the public demanded like action, since otherwise the road could not be maintained as a going concern; that the system consisted of a number of component roads situated in six different states, forming an important trunk line, *and that unless the property was taken into judicial custody* it would be dismantled, dissipated and dismembered; that vast sums of money would be lost to the creditors and stockholders and the public interests seriously affected; that the unity of the property and its integrity as a whole constituted one of the most important elements of its value, and that its severance would result in ruinous sacrifice of every interest in the property. The hope was expressed that by the appointment of receivers, not only would these grave and threatened dangers be averted, but that the company would ultimately be able to pay its floating indebtedness, etc., the language of the bill on this point being as follows: "That by the appointment of a receiver or receivers as herein prayed the Seaboard Air Line Railway system may be preserved as a whole and maintained and operated to the advantage of its creditors and stockholders and the public, and its floating debts be ultimately paid, and the forfeitures, deficiencies and other incidents aforesaid be prevented."

To this bill the Continental Trust Company, as trustee, was the sole defendant, the bill alleging "that there is in

this cause *a dispute and controversy wholly between your orator and the defendant,*" which can be determined "without reference to others."

The Continental Trust Company answered the bill, and in its answer admitted all the allegations of the bill, *including the allegation of insolvency,* and also united in the prayer for the appointment of receivers on the grounds stated in the bill.

Upon the filing of the answer a decree was entered appointing receivers, and ordering the officers and agents of the railway company to forthwith turn over all books of account, vouchers, papers, moneys, equipment, and any "other property of any kind" in their hands, or under their control, to the receivers, the latter being required to take immediate possession and to continue the operation of the road under the authority and supervision of the court. And by the same decree the railway company, its officers and agents, were "*enjoined and restrained from interfering in any way whatever with the possession or management of any part of the said property,*" etc. The same decree also authorized the receivers, in their discretion, to pay out of the moneys to come into their hands all "supply accounts incurred in the operation of said railroad system since June 30, 1907"—that is to say, incurred within six months prior to the receivership.

A few days afterwards—to-wit, on the 14th of January, 1908—the Continental Trust Company, as trustee, filed its cross-bill, *again recognizing the insolvency of the railway company* and praying the appointment of receivers. Shortly afterwards it filed its bill in the same court to foreclose the mortgage, *averring the insolvency* of the railway company, *seeking only a foreclosure or sale of the equity of redemption,* and praying the appointment of receivers. Re-

ceivers were appointed, the same that had been appointed in the first suit, and the two suits were consolidated.

The last mentioned bill was the ordinary bill of foreclosure. As the Circuit Court of Appeals has certified, *it was in no sense a creditors' bill. No prior encumbrancers were made parties to either suit, and no prior encumbrancer, as stated in the stipulation of counsel in the record, was permitted by the court to intervene or become a party,* although a number of alleged prior supply lienors sought to do so. The defendants to the foreclosure suit, besides the railway company, were trustees in certain junior mortgages.

So that the case, not being a suit for the distribution of the proceeds of a common security between liens of different priorities, widely differs from *Central Trust Co.* v. *Condon* (C. C. A.) 67 Fed. Rep. 84, and other cases of that class, cited by appellant.

There is no imputation, certainly there is no ground for the imputation, of bad faith on the part of the railway company or of any other party to the litigation.

As to the claim in question, the facts are that the appellant, a corporation, furnished to the railway company, prior to the receivership, supplies for the operation of the road, amounting in the aggregate to $21,479.77. The terms of the sale were "thirty days, 1% discount allowed for payment in ten days." The account contained a large number of items running over a period of about nine months, the date of the first item being April 3, 1907; the last item fell due January 18, 1908, several weeks after the receivership began, that being the expiration of the thirty days' credit from the date of the last item in the account.

The statute of Virginia known as the supply lien statute, under which appellant claims a lien, is now carried into sections 2485 and 2486 of the Code of Virginia. Those sections enact as follows:

"Sec. 2485. All persons furnishing railroad iron * * * and all other supplies necessary to the operation of any railway * * * shall have a prior lien on the franchises, gross earnings, and on all the real and personal property of said company, which is used in operating the same, to the extent of the money due them by said company for such * * * * supplies. And no mortgage, deed of trust, sale, hypothecation, or conveyance * * * shall defeat or take precedence over said lien.

"Sec. 2486. No person shall be entitled to the lien given by the preceding section unless he shall within ninety days after the last item of his bill becomes due and payable for which supplies are furnished * * * file in the clerk's office of the court of the county or corporation in which is located the chief office in this state of the company against which the claim is * * * a memorandum of the amount and consideration of his claim, verified by affidavit, * * * and such lien may be enforced in a court of equity."

As will be observed, section 2485 gives to a person furnishing such supplies to a railway company a lien on the franchises and property of the company prior to any mortgage thereon, etc. Section 2486 provides that such person, to be entitled to the lien, must perfect it within ninety days after the last item of his bill becomes due by filing it—i. e., a proper memorandum—in the proper clerk's office, etc. 2 Pollard's Virginia Code.

Appellant filed its lien in the proper clerk's office on the 9th of April, 1908, several weeks, as already stated, after the receivership began. There had been no previous liquidation of the account.

After the consolidation of the suits the cause was referred to a special master to ascertain and report all claims against the railway company, with their priorities, etc.

The appellant presented its claim to the master, *not as a preferential equitable claim, under the doctrine of Fosdick* v. *Schall, 99 U. S. 235, but as a prior "statutory supply lien,"* and claimed interest from the 19th day of January, 1908, the day after the thirty days' term of credit had expired. It was contended that the claim, as it was secured by a supply lien, was not subject to the six months' rule that had been adopted by the Circuit Court in regard to the payment of preferential equitable claims, and the right was asserted *to enforce the statutory supply lien in the consolidated cause.*

In the purchase of the supplies in question there was no express promise to pay interest, nor is there in the record any proof or suggestion of custom or usage of trade, or course of dealing between the parties, from which a contract to pay interest could be implied. *Easterly* v. *Cole,* 3 Comstock 502. It does not appear that prior to the account in question there was ever a transaction of any sort between the parties. It was simply the case of an open running account, which had not been rendered or liquidated at the time the receivership began. And while "each shipment of said supplies was invoiced to the railway company," and the terms of sale stated, it must be taken that the supplies were purchased *under a single contract and in fulfilment thereof.* In such a case, as the highest court of Virginia has decided in construing the statute, the items of the account are continuous, and hence the ninety days allowed by the statute for the filing of the lien is counted from the date when the last item in the account becomes due. *Bank* v. *Trigg Co.,* 106 Va. 327, 339, 340. This was the view taken by the appellant in the

present instance, as the lien was not perfected, by being filed in the proper clerk's office, until the 9th of April, 1908, the date of the first item in the account being April 3, 1907, or more than a year before the filing of the lien.

The master reported the claim as a "supply lien, current account," but reported against the allowance of interest, and appellant excepted to the report disallowing interest, on the ground, mainly, that its claim was "a statutory supply lien." The existence of a lien was not disputed.

By two payments—one made before, the other after, the filing of the master's report—the receivers paid the whole of the principal of the claim, but refused to pay interest, on the ground that there was no contract, express or implied, to pay interest when the supplies were furnished, and therefore interest did not run during the period of the receivership, while the property of the debtor company was in *custodia legis*, etc. The question of interest was referred to the determination of the Circuit Court.

The stipulation of counsel, containing an agreed statement of facts, states that "the record establishes a diversion of funds, under the doctrine of *Fosdick* v. *Schall*, aggregating very many thousands of dollars, and much more than sufficient to pay the interest claimed" of the appellant. But as appellant has throughout the litigation disclaimed reliance on the doctrine of *Fosdick* v. *Schall*, and has distinctly relied upon its alleged prior *statutory lien*, it would seem to be obvious that the question of diversion has nothing whatever to do with the case. This would be equally true if the principal of the claim had not been paid. The same remark applies to what is said in regard to the issue and payment of receivers' certificates; expenditures during the receivership for improvements; payments of interest on mortgage bonds, etc.

Before the expiration of the second year of the receiver-

ship the railway company and certain of its creditors agreed upon a plan of reorganization, or a plan of adjustment of its finances, as it was called, whereby a way was opened for terminating the receivership. The plan provided, among other things, for a large issue by the company of new securities, of different classes, to be secured by new mortgages, some to be used in place of older securities, the proceeds of others to be used in paying receivers' certificates and other indebtedness. The various classes of the company's obligations or indebtedness which it was contemplated to cancel or make provision for were carefully specified, but nothing was said about statutory supply liens or any indebtedness of the class to which the appellant's claim belongs. The plan proposed that, with the approval of the Circuit Court, the property and business of the company be turned back to it, and that the receivership be terminated at midnight on a certain day.

The court by its decree of October 18, 1909, rendered on the petition of the railway company, approved the plan, and, with the aid of the creditors above mentioned, the plan was carried out, and the receivership ended accordingly.

The point is made by appellant that the company at that time was solvent. But neither the plan of reorganization, nor the petition of the railway company explaining and praying approval of it, nor the decree approving it, contains a suggestion to that effect. It is evident that the company was enabled, after the receivership had continued for nearly two years, to stand upon its feet, or to resume operations, *by the issue of new obligations*, with the aid and indulgence of the bondholders. But be that as it may, there is no question as to the insolvency of the company at the time of the institution of the litigation, and the question as to the effect of the suit upon the matter of interest is, as appellees conceive, in no degree dependent upon the

financial condition of the company at the termination of the receivership, much less upon any mere conjecture concerning it. Whether solvent or insolvent, the company was not legally in default during the period of the receivership.

The decree of October 18, 1909, required the company, after the termination of the receivership, to pay in due course of business its debts and liabilities contemplated by the decree, and provided that in the event of its failure to do so any person aggrieved thereby should have the right to apply by petition to the Circuit Court to compel payment, etc. It also provided that the liabilities contemplated therein should continue to "*the same* extent as though *the receivership had continued,*" and jurisdiction of the cause was retained so far as necessary to enforce the provisions of the decree.

As to appellant's claim, apart from what has been said in regard to it, it cannot be said that the claim is within the contemplation of the decree, as the Circuit Court had repeatedly and invariably ruled that claims of that class did not carry interest during the receivership; and this ruling, it may be added, had been affirmed by the Circuit Court of Appeals in the only instance in which an appeal had been taken. *Tredegar Co.* v. *Seaboard Air Line Railway,* 183 Fed. Rep. 289.

Appellant, however, filed its petition in the Circuit Court, shortly after the termination of the receivership, setting forth that its lien had been perfected under the statute; that the master had rejected the claim for interest; that an exception to the report on that ground had been filed, but had not been acted upon before the receivership had been terminated; *expressly averring that the lien was not an equitable one, but a prior statutory lien;* admitting that the principal of its demand had been paid by the receivers,

and praying a decree against the railway company for interest.

The Circuit Court dismissed the petition, and from the decree of dismissal an appeal was taken to the Circuit Court of Appeals.

The grounds of the decree, though not specified, were, as appellees understand it, these:

a. That in a case of this sort—*i. e.*, in the case of a demand for goods sold on a credit, without any agreement for interest in the event of non-payment at the stipulated time—the law does not imply a promise to pay interest;

b. That consequently interest is not a substantive part of the debt, recoverable as of right, but is matter of discretion, allowed, when allowed at all, as damages, and never allowed except default can be legally predicated of the debtor;

c. That in the present case the receivership suit having intervened, and the property of the debtor being *in custodia legis* while the suit was pending, the delay that occurred in respect of the debt in question was the act of the law, and therefore default cannot be predicated of the debtor during that time;

d. That, apart from the foregoing considerations, the statutory lien was not enforceable in this suit; and

e. That no such right, or any right to recover interest, or to file a petition, was given to appellant by the decree of October 18, 1909, providing for ending the receivership. In other words, that the appellant's claim was not within the purview of that decree.

And the Circuit Court of Appeals has certified to this court the question, "Is interest recoverable on such a claim for the period of the receivership?"

ARGUMENT.

The question will be discussed in two aspects: *First*, whether interest was recoverable, as the case stood before the decree of October 18, 1909, providing for terminating the receivership; and if not, then, *secondly*, whether the right to interest or to file a petition was given by that decree. For the appellees it is submitted that these questions were rightly answered in the negative by the decree of the Circuit Court dismissing the appellant's petition.

I.

INTEREST NOT RECOVERABLE AS THE CASE STOOD BEFORE THE DECREE OF OCTOBER 18, 1909.

Under the head of interest not being recoverable, independently of the decree of October 18, 1909, our contention is (1) that appellant's debt for supplies furnished not being founded upon a commercial instrument, or a promise in writing for the payment of money, or anything of the sort, but being a mere "book debt," interest was not a substantive part of the debt, recoverable as of right, notwithstanding the subsequent filing of a statutory lien; (2) that this being so, and as the debtor, the railway company was not, in the eye of the law, in default in respect of the claim during the period of the receivership—its property being *in custodia legis*, etc.—the case is not within the class of cases wherein interest may, in the exercise of a discretionary power, be allowed, not as a part of the debt, but as damages, for the default of the debtor; and (3) that, independently of these considerations, the statutory lien acquired by appellant is not enforceable in this suit, as the consolidated suit was not in any sense a creditors' suit,

or a suit for the distribution of the proceeds of a common security between liens of different priorities.

(1) *Interest was not a substantive part of appellant's debt.*

Was interest a substantive part of appellant's debt? As already stated, the account of the appellant was an ordinary running account for supplies furnished the railway company, which was not rendered, nor did it become due, until after the receivership began. The terms upon which the supplies were sold were "thirty days, 1% discount allowed for payment in ten days." If appellant chose to sell its goods on credit without a contract for interest, it had the right to do so, and certainly it has no one but itself to blame for having done so. As it was, nothing was said about interest; *nor is there in the record any evidence of any other dealings between the parties, or of custom or usage in regard to interest in such matters.* In short, no facts or circumstances were shown from which an agreement to pay interest could be implied. The Circuit Court, therefore, held that the demand did not carry interest as of right, and that its nature in that respect was not changed by perfecting a statutory supply lien to secure it. This would seem to be the obviously correct view, as the supply statute says nothing about interest, but leaves that question to be settled outside of the statute. In other words, the lien secures the claim, such as it is; whether it is an interest-bearing debt or not is a matter outside of the statute. The statement in appellant's brief that the state courts have always construed the statute (sec. 2485) as giving a lien for interest as well as principal is unfounded, if the meaning is that the statute itself

gives interest; for there is no such decision,—certainly none such is cited in the brief.

The precise question on this branch of the case is this: Where goods are sold on a credit, to be paid for on a certain day, nothing being said about interest, does the law imply a promise to pay interest after the term of credit has expired? In other words, is interest in such a case a part of the debt proper, as to which the courts or juries have no discretion?

In this connection it is worthy of remark that by the old common law interest was not allowed in any case. As this court has taken occasion to observe, "it was held in detestation," the taking of it being a punishable offense. It is a creature of statute. The first statute on the subject was the statute 37 Henry VIII, and that was not an affirmative but a negative statute, providing as it did that "none shall take for the loan of any money or commodity above the rate of ten pounds for one hundred pounds for one whole year." The statutes on the subject in this country are for the most part, it is believed, of the same character; they are merely permissive; they remove the ban of illegality from the taking of interest, within certain limits, but they do not require it to be paid. This is certainly so in Virginia, where the statute declares the legal rate of interest, with the accompanying provision that "no person upon any contract shall take for the loan or forbearance of money or other thing above the value of such rate." 2 Pollard's Virginia Code, sec. 2817.

So that it follows that interest is a matter of agreement, as all liability must be fixed by law or agreement. When allowed in other cases it is allowed, not as of right but as damages.

At the present day there are three classes of cases in which interest is allowable, viz: (1) Where given by stat-

ute; (2) where it is contracted for; and (3) where given by way of damages for the default of the debtor, in the latter case its allowance being matter of discretion, to be determined upon the particular circumstances of the case. The latter view may be said to be the statutory rule in Virginia, as we shall see, however the law as to this point may be in some other jurisdictions.

The very broad distinction between contractual interest and interest allowed as damages is overlooked or ignored in the contention of appellant. In regard to cases of the first class, the rule giving interest is fixed and arbitrary, the matter of interest being a mere matter of calculation, whilst to cases of the latter kind what has been called "the discretionary rule" applies. The difficulty and confusion on the subject of interest has, undoubtedly, largely arisen from the failure to distinguish between those cases in which interest must be allowed as a part of the debt, pursuant to contract, and those in which, in the exercise of a judical discretion, it *may* be allowed as damages.

The distinction has been recognized by this court. Thus, in *United States* v. *North Carolina*, 136 U. S. 211, in an opinion by Mr. Justice Gray, it was said that "interest, when not stipulated for by contract, or authorized by statute, is allowed by the courts as damages for the detention of money or of property, or of compensation, to which the plaintiff is entitled," and, further, that whenever interest is allowed, "except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor," the latter proposition being a quotation from the opinion of the court in *United States* v. *Sherman*, 98 U. S. 565.

Express contracts to pay interest are no doubt universally upheld, subject, of course, to the laws against usury; and, as the authorities say, the law will imply a contract

to pay it from the usage of trade, or from the course of dealing between the parties, or the special custom of one of them known and acceded to by the other. So, also, in the case of a promise in writing for the payment of money at a certain time, a contract to pay interest, in the absence of express stipulation, is generally implied, from the nature of the transaction, though the instrument be not negotiable.

In *Robinson* v. *Bland*, 2 Burr. 1086, a contract to pay interest on money lent was inferred by Lord Mansfield and his associates, not, however, from the nature of the transaction itself, but from the fact of a bill of exchange having been given for the debt, as such a security always carries interest by mercantile usage. The case, therefore, widely differed from the ordinary case of an action for goods sold.

As to cases of the latter class, *Gordon* v. *Swan*, 2 Campb. 429, is one among numerous authorities recognizing the rule as well established that interest, in the absence of contract, is not recoverable on an account for goods sold and delivered, though to be paid for at a certain day,—in that case at six months. There, in answer to the contention that if any particular time be limited for the payment of the price, the vendor is entitled to interest on the price from that time, Lord Ellenborough, C. J., observed that if interest was allowed in that case it must be allowed in almost every action for goods sold, as it generally happens that credit is given for a specific time; that there must be a fixed rule upon the subject, and that what he said in *De Havilland* v. *Bowerbank*, 1 Campb. 50, was to be taken as referring to written instruments, such as promisory notes and bills of exchange, which were there put as examples. Bayley, J., said: "The six months' credit is for the benefit of the purchaser, and means that he

shall not be arrested or sued till the expiration of that time."

In other words, according to this rule, the fact of a specific credit having been given is not a circumstance, standing alone, from which a contract to pay interest is legally inferrible.

In *Porter* v. *Palsgrave*, 2 Campb. 472, the circumstances were different. That was an action for not accepting a bill of exchange for the price of certain goods sold "to be settled for by bill of exchange at six months' date." It was held by the court of King's Bench that the vendor was entitled to interest from the time the bill, if given, would have been due, on the ground that while in the sale of goods merely naming a day when payment is to be made for cash is no more than a provision that payment shall not be demanded earlier, the agreement to pay by a bill of exchange "makes all the difference." Had the bill been accepted, as it ought to have been, interest would have been recoverable on it, and the defendant was not allowed to profit by his own wrong. In other words, like the case of *Robinson* v. *Bland*, and unlike the cases of which *Gordon* v. *Swan* is a type, it was a case from the circumstances of which a promise to pay interest was inferrible.

The often cited case of *Carlton* v. *Bragg*, 15 East 223, illustrates the distinction between book debts and promises in writing for the payment of money. In that case Lord Ellenborough, in combating the idea that a promise to pay interest is inferrible from the mere loan of money, said:

> "In fact there has been no instance of its being allowed except upon written securities for the payment of money at a given time, or upon an express or implied agreement for it. The judgment of Lord

> Mansfield in the case of *Robinson* v. *Bland* and of the eminent judges who sat with him shows that interest is not due without a contract for it, for they never would have resorted to the argument of intention to be collected from the giving a void bill of exchange in order to support the claim of interest if the law would have given it without, upon the mere loan of money. * * * Hitherto," his Lordship added, "interest has only been allowed upon written contracts for the payment of money at a given day, and upon contracts express or implied for the payment of interest. If it be fit that the rule should be carried further, it must be done by the legislature."

This idea of its belonging to the legislature, and not to the courts, to enlarge the rule, it may be remarked in passing, has been acted upon by a number of the American States, among them Illinois, in which latter State the statute, after fixing the rate of interest, allows the recovery of interest, among other things, "on money due on the settlement of accounts from the day of liquidating accounts," etc.,—a statute that came under review by this court in *Cooper* v. *Coates*, 21 Wall. 105.

The English Parliament acted upon the same idea in passing the statute 3 and 4 Wm. IV, ch. 42 (sec. 28), which enlarged the rule, but nothing like to the extent of appellant's contention in the present case. 2 Chitty on Contracts (11th ed.) 960, *note*.

In *Eddowes* v. *Hopkins*, Doug. 376, which was an action for goods sold and delivered, it appeared that, according to an applicable *usage of trade*, the goods were sold on a certain credit, after which time interest to be charged at five per cent. The verdict gave interest accordingly, and

Lord Mansfield observed that "though by the common law book debts do not of course carry interest, it may be payable in consequence of the usage of particular branches of trade, or of a special agreement, or in cases of long delay under vexatious and oppressive circumstances, if a jury in their discretion shall think fit to allow it."

It has been decided in Virginia that an obligation for the payment of money at a given day, saying nothing about interest, carries interest from that time; also that a bond payable on demand (which is payable presently) carries interest from date, such in either case, from the nature of the transaction, being the presumed intention of the parties. *Chapman* v. *Shepherd's Admr.* 24 Gratt. 377; *Kent* v. *Kent*, 28 Gratt. 840. Book debts, however, as we shall see, stand upon a very different footing.

The case in this court of *Curtis* v. *Innerarity*, 6 How. 146, was a suit to foreclose a purchase-money mortgage. The purchaser went immediately into possession of the land, and remained in possession, under a title that was perfectly good. In short, the circumstances of the case were very strong for allowing interest on the ground of an implied contract.

In *Southern Railway Co.* v. *Carnegie Steel Co.*, 176 U. S. 257, the debt was evidenced by interest-bearing notes, and was allowed as a preferential claim in a receivership suit under the doctrine of *Fosdick* v. *Shaw*. The case in all its features is distinguishable from the case at bar.

In *Easterly* v. *Cole*, 3 Comstock 502, which was an action for goods sold and delivered, interest was allowed from the expiration of the stipulated term of credit, *based upon proof that it was the practice of the plaintiffs to charge interest after six months on goods sold by them, and that this fact was known to the defendant; also, upon proof*

of the general usage among merchants in the neighborhood.

But the case at bar is very different. Here not only was there no express promise to pay interest, but there was no evidence of usage, or anything from which a promise to pay interest could be implied.

As the matter of implying a promise to pay interest involves emphatically, a question of intention, it has been well said that such a promise cannot be implied, unless "the circumstances indicate a manifest intention on the part of the creditor to claim interest, and on the part of the debtor to accede to such a claim."

In the present case, for aught the record shows, there was never any other transaction between the parties than the one in question, and no doubt when the order for the supplies was given it was supposed on both sides that the bill would be punctually paid, and the thought of interest never entered the minds of either party; so that to decree a contract to pay interest as existing by implication of law would be to impose upon the parties a contract which, as a matter of fact, they almost certainly never contemplated.

As to the nature of the transaction, it is no more than the ordinary case of a current account for supplies, which at the time the receivership began had not been liquidated. The fact, we repeat, that a lien was afterwards perfected under the supply statute cannot affect the question of interest.

The case, therefore, it is submitted, falls within the third class of cases above mentioned wherein interest is a matter of discretion, and not of right; and in such a case interest is never allowed where *delay or default cannot be predicated of the debtor.* If the circumstances of the case are such as that the debtor is not legally in default, then the plain-

tiff is not entitled *ex aequo et bono* to recover damages in the form of interest, and interest will be withheld.

It has been said to be a maxim that "there can be no interest without default where by the contract it does not run with the principal." This was the view taken by this court in *United States* v. *Sherman*, 98 U. S. 565, 567, where Mr. Justice Strong for the court observed that whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor, and that consequently where default cannot be attributed to the debtor it will be denied.

To undertake to reconcile the very numerous authorities on the subject of interest would be to attempt the impossible. Many of the cases seem to have been decided without reference to any general principle. Not a few of them fail to distinguish between contractual interest and interest allowed as damages, often confounding the two things, and consequently perplex rather than enlighten.

Fortunately, there are a number of cases in this court which place the subject, and the underlying principle, in a clear light; and those cases support the rule above stated, namely, that while interest, when there is an agreement to pay it, is recoverable as matter of law, in other cases, *i. e.*, where it is given not as a part of the debt but as damages, it is matter of discretion, to be determined upon the particular circumstances of the case.

Thus, in *Erskine* v. *Van Arsdale*, 15 Wall 75, which was an action to recover back moneys alleged to have been illegally exacted of the plaintiff by the defendant as internal revenue taxes, an instruction to the jury that if they found for the plaintiff they *might* add interest was approved by this court, thus recognizing that if the money had been wrongfully collected the promise that *the law*

implied to pay back the principal did not extend to interest. In other words, that the question of interest in such a case was a matter in the discretion of the jury.

In *Redfield* v. *Ystalyfera Iron Co.*, 110 U. S. 174, it was distinctly held that interest allowed by way of damages is matter of discretion, and that therefore it will be withheld when the plaintiff has been guilty of laches in the prosecution of his claim, as in that case. The rule on the whole subject was stated with great precision in the opinion by Mr. Justice Matthews in these words:

> "Interest is given on money demands as damages for delay in payment, being just compensation to the plaintiff for a default on the part of his debtor. Where it is reserved expressly in the contract, or is implied by the nature of the promise, it becomes part of the debt, and is recoverable as of right; but when it is given as damages, it is often matter of discretion. In cases like the present, of excessive duties paid under protest, it was held in *Erskine* v. *Van Arsdale*, 15 Wall. 75, that the jury might add interest, the plaintiff ordinarily being entitled to it from the time of the illegal exaction. But where interest is recoverable, not as part of the contract, but by way of damages, if the plaintiff has been guilty of laches in unreasonably delaying the prosecution of his claim, it may be properly withheld."

A striking illustration, especially in view of the general rule that laches of its agents is not imputable to the government, is *United States* v. *Sanborn*, 135 U. S. 271. That was an action by the United States to recover back with interest a certain sum of money that had been paid to the defendant in consequence of a misrepresentation by him to the secretary of the treasury.

Now, while there are some authorities, as for instance,

Dodge v. *Perkins*, 9 Pick. 368, 385, which say that where money is obtained by fraud the law implies a promise to pay interest as well as principal; that interest is as much a part of the debt as the principal, yet such was not the view taken by this court in *the Sanborn case*. It was accordingly there held that while the principal sum ought in equity and good conscience to be returned to the plaintiffs, the trial court erred (a jury having been waived) in allowing interest, because of the unexplained delay of a little over ten years in bringing the action. The court, speaking by Mr. Justice Harlan, said:

> "In *Redfield* v. *Ystalyfera Iron Co.*, 110 U. S. 174, the question was whether the plaintiff was entitled, under the circumstances of that case, to recover interest, the action being against a collector to recover damages for an illegal exaction of custom dues. The court, after observing that interest is recoverable as of right when reserved expressly in the contract, or when implied by the nature of the promise, said: 'but where interest is recoverable not as a part of the contract, but by way of damages, if the plaintiff has been guilty of laches in unreasonably delaying the prosecution of his claim, it may be properly withheld.' "

This rule was held to be applicable to a case like that then before the court, "especially when it does not appear that defendant has earned interest upon the money improperly received by him." The result was, in effect, a decision that in such a case interest is not recoverable as matter of law and that in determining whether or not it ought to be allowed by way of damages, regard must be had to the special circumstances of the case; and to the same effect is the analogous case of *Redfield* v. *Bartels*, 139

U. S. 694, where the Chief Justice observed that "interest was recoverable as damages only." See, also, *Stewart* v. *Barnes*, 153 U. S. 456, 462.

The principle illustrated by these cases demonstrates, as we conceive, the fallacy of the appellant's sweeping contention in the present case that interest follows the principal as the shadow does the substance. The phrase sounds well, but is misleading, as well sounding phrases often are, since it is far from embodying a proposition of universal application. However applicable it may be to a case of contractual interest, or to a case where interest is given by statute, it is not applicable to a case like the present, no more than in an action on the case for fraudulently obtaining the goods of the plaintiff. *Lincoln* v. *Claflin*, 7 Wall. 132.

Spalding v. *Mason*, 161 U. S. 375, was a suit for an accounting as to certain fees that had been collected by the defendant in which the parties to the suit were jointly interested, and was clearly a case in which the allowance of interest was a matter in the discretion of a court of equity.

Nor is *Young* v. *Godbe*, 15 Wall. 562, an authority for appellant, but quite the contrary. That was an action on an account stated for money advanced, and while the court in a general way said that if a debt ought to be paid at a particular time, and is not, owing to the default of the debtor, the creditor is entitled to interest from that time by way of compensaion for the delay in payment, it was not said that he was entitled to interest as matter of law, for it was added that in such a case interest when allowed, is "allowed by way of damages"; so that what the court meant was that while ordinarily in such a case, when the circumstances of the case warrant it, the creditor is given interest, it is not given as a part of the debt, recoverable as of right, but as damages. It was evidently not meant

to decide anything in conflict with the rule recognized in the previous case of *Erskine* v. *Van Arsdale*, and in the subsequent cases in this court, to which reference has been made.

Because in a case like *Young* v. *Godbe* interest is usually allowed, it does not follow that it is recoverable of course as a substantive part of the debt. It is a matter in the judicial discretion of the court or jury, as the case may be, to be determined upon the particular circumstances of the case.

But appellant insists that according to *Ohio* v. *Frank*, 103 U. S. 697, and other cases in this court, the question of interest is one of local law. Conceding this to be true, appellees deny that there is anything in the law of Virginia in conflict with the cases in this court to which reference has been made, or with the decree of the circuit court in the present case, but quite the contrary. Certain expressions in some of the Virginia cases are relied upon by appellant, but those expressions do not, of course, establish any principle beyond the cases in which they were used; and not one of the cases in which they were used, we venture to affirm, bears any analogy to the case at bar.

In those cases in which it has been said that interest is not given as damages at the discretion of the court or jury, but as a part of the debt, etc., the court was speaking of obligations or other written instruments for the payment of money at a given day, the point decided being that in such cases, in the absence of an express contract, the law implies a promise to pay interest from the date appointed for the payment of the principal.

Take, for example, the case of *Chapman* v. *Shepherd's Admrs.*, 24 Gratt. 377, relied on by appellant. That was a suit for the settlement of executorial accounts in which the question arose as to the liability of the executors for

interest on a certain debt due the estate which had been lost by their negligence. The debt was evidenced by "a bond in the nature of a penal bill or obligation," and a statute of Virginia provided that for a breach of the condition of such a bond judgment should be entered for the penalty to be discharged by the payment of the principal *and the interest* due thereon. It was therefore held that as the executors, if they had sued upon the bond before the insolvency of the obligors therein, could have collected both principal and interest of the debt, they were chargeable accordingly. The remarks of the judge who delivered the opinion as to interest not being given as damages, in the discretion of the court or jury, but "allowed as the judgment of the law," were expressly confined to "contracts of the character just mentioned," namely, obligations for the payment of money on demand, or at a given date, when nothing is said about interest.

Roberts v. *Cocke*, 28 Gratt. 207, also relied upon by appellant, recognizes the same doctrine, and does not go beyond it. That was an action of debt on a bond dated December 12, 1860, payable nine months after date, with interest from date. The question of interest arose in connection with a statute of Virginia, passed soon after the civil war, empowering the courts and juries of the State in suits for the recovery of money founded on contracts entered into prior to the 10th of April, 1865, to remit the interest for the period between the 17th of April, 1861, and the first mentioned date. The statute was held to be unconstitutional as impairing the obligation of contracts, inasmuch as interest, being expressly stipulated for in the bond in question, was a part of the debt and recoverable as of right. All that was said on the subject of interest had reference to "obligations for the payment of a certain sum of money on demand or on a given day," as to which it

was said that, in the absence of an express agreement, a promise to pay interest on the principal sum from the time it becomes payable is implied; that is, interest in such a case is a legal incident of the debt, and the right to it is founded on the presumed intention of the parties; citing *Chapman* v. *Shepherd's Admr., supra.*

Murphy v. *Gaskins*, 28 Gratt. 207, 222; *Cecil* v. *Deyerle*, 28 Gratt. 775; *Kent* v. *Kent*, 28 Gratt. 840; *Cecil* v. *Hicks*, 29 Gratt. 1; *McVeigh* v. *Howard*, 87 Va. 599; *Tidball* v. *Shen. National Bank*, 100 Va. 741, are to the same effect, being cases founded upon bonds or notes for the payment of money on demand, or at a given time, the contract in each case being construed in conformity with the presumed intention of the parties. *The Murphy case* was the case of an unsuccessful attempt on the part of a judgment debtor to have the interest included in the judgment abated under a certain provision of the above mentioned act of the legislature.

None of these cases go beyond the rule recognized by the court of King's Bench in *Farquhar* v. *Morris*, 7 Term Rep. 124 (decided in 1797), which was the case of a bond, conditioned for the payment of a lesser sum, dated on a day certain, without naming any day of payment or expressly reserving interest. It was held that the bond was payable on the day of its date, and that it impliedly carried interest from date. That case has never been supposed to conflict with *Gordon* v. *Swan*, 2 Campb. 429, and other English cases in regard to book debts to which reference has been made.

Jones v. *Williams*, 2 Call, 102, was simply a suit for the settlement of fiduciary accounts in which a balance having been ascertained to be due the plaintiff, a decree for that amount with interest was entered in his favor.

As to *Hatcher* v. *Lewis*, 4 Rand. 152, that case, which

involved a technical question of pleading, was decided upon a local statute. It was a joint action against the maker and endorsers of a protested negotiable note, in which interest though demanded in the declaration was not demanded in the writ. It was held that that was no valid ground of objection, because, as the court said, "by the statute in that case provided, the interest follows the principal as the shadow does the substance." Of course it did, but the court of appeals did not intend by the language just quoted to lay down a general, much less a universal rule on the subject of interest, or to go beyond the narrow limits of the case then before it; yet its expression as to the effect of the statute relative to suits on protested negotiable notes has been seized upon as enunciating a principle of local law applicable to a case like the present. It is safe to say that no one in Virginia at that day dreamed of a demand for goods sold on credit carrying interest as matter of law, or, in other words, that in respect of such a demand interest followed the principle as the shadow does the substance.

This same expression was used by the court, as a quotation from *the Hatcher case*, in *McVeigh* v. *Howard*, 87 Va. 599. But that was the case of a bond for the payment of money on demand, which being payable presently was held to impliedly carry interest from date.

Buchanan v. *Leeright*, 1 Hen. & M. 211, also cited by appellant, turned upon the construction of a mortgage. It was covenanted in the mortgage that if the debt secured thereby should be paid at the appointed time, i. e., "on or before the 1st of December, 1800, or within sixty days thereafter," no interest would be charged. Payment was not made at the appointed time, and the lower court decreed interest from the date of the mortgage (October 1, 1796), but the decree was reversed, on the ground that a promise

to pay interest before the debt became payable could not be implied, although the defendant had had the use of the plaintiff's money for a number of years. And in this connection we invite attention to the later case of *Shelton's Ex'ors* v. *Welsh's Admrs.*, 7 Leigh, 175, where it was held that a decree for money which said nothing about interest did not carry interest, and that therefore a declaration in an action of debt on such a decree was *substantially defective in demanding interest.*

Can any reason be imagined why a claim for goods sold should, independently of statute, carry interest as matter of law any more than a judgment for money, a judgment or decree for money being a debt of record?

As to expressions in judicial opinions which go beyond the case in which they are used, we have been told by this court, speaking by Chief Justice Marshall, that it is a maxim, founded upon obvious reason, that such expressions are of no authority in a subsequent suit. Stronger language could not have been employed, and so it may be truly said that while hardly any doctrine in the law is more important, there is none the extent of which is better defined and understood, than that of *stare decisis.* In a word, it has to do only with direct decisions upon *"the precise question* necessary to be determined." *Cohens* v. *Virginia*, 6 Wheat. 264, 399; *Carroll* v. *Carroll*, 16 How. 275, 287; *St. Louis Railroad* v. *Terre Haute Railroad*, 145 U. S. 393, 404.

No doubt the American courts have pretty generally adopted rules more liberal regarding the allowance of interest than those to be deduced from the English decisions. In some of the States, Kentucky for instance, (*Henderson Cotton, &c. Co.* v. *Lowell Machine Shops*, 86 Ky. 668) the courts have gone so far as to hold that upon a demand for goods sold, payable at a certain time, where the debtor is in default, interest is recoverable as matter of law; and

several cases along that line are cited in the opinion in *Atlantic Phosphate Co.* v. *Grafflin*, 114 U. S. 492. But the law has not been developed to that extent, and such is not the rule, in Virginia. The general practice, to be sure, is to allow interest in such a case, but in the absence of agreement it is a matter in the discretion of the jury. The appellant cites no Virginia case, and there is none, to the contrary.

At an early day the question arose in Virginia as to whether interest was recoverable in an action for rent in arrear, and the result shows how strong was the inclination of the court of last resort to be strict rather than liberal in laying down rules in regard to the allowance of interest. It was held that *prima facie* interest in such a case was not recoverable, but that it might be given under circumstances to be judged of by the jury. *Cooke* v. *Wise*, 3 Hen. & M. 463; *Newton* v. *Wilson*, Ibid. 470; *Dow* v. *Adams' Admr.*, 5 Munf. 21. The amount of the rent was certain, and it was payable at a certain time; and as counsel contended that an action for rent in arrear stood on the same footing as an action on a demand for goods sold and delivered, and that in actions of the latter kind it was customary to allow interest (as damages), what the judges said in that connection is instructive as showing the law in Virginia on that subject. Judge Tucker, in the course of his opinion in the first two cases (3 Hen. & M., p. 488) in which Judges Lyons and Fleming concurred, said:

> "But it may be objected that a jury may, and frequently do, give interest for book debts and other such contract debts, and why not also for rent arrear?
>
> With respect to these, the general rule is that the jury *cannot give interest*, because such debts

> do not carry interest by the common law, but it may be payable (according to Lord Mansfield) in consequence of particular branches of trade, or of a special agreement, or in cases of long delay under vexatious and oppressive circumstances, if a jury in their discretion shall think fit to allow it"; citing *Eddowes* v. *Hopkins*, Doug. 376, and other English authorities.

Here, certainly, was no extension of the English rule, but a recognition of its being the law in Virginia, and these cases have never been judicially overruled (*Mickie* v. *Wood*, 5 Rand. 571), although by a subsequent statute interest in an action for rent is allowable as on other contracts.

It may therefore be safely affirmed that, however the law in some other jurisdictions may be, in Virginia interest in an action for goods sold and delivered, though sold on a specified credit, is matter of discretion, except where there is a controlling agreement of the parties, express or implied.

The subject, indeed, is covered by a statute, passed a good while ago, which enacts that "the jury in an action founded on contract may allow interest on the principal due, or any part thereof, and fix the period at which such interest shall commence." 2 Pollard's Virginia Code, sec. 3390. This statute of itself, interpreted in the light of the law as it existed at the time of its passage, as shown by the remarks of Judge Tucker, above quoted, negatives the idea that in Virginia a claim for goods sold carries interest, in the absence of an agreement, as matter of law.

According to the English rule, as we have seen, the credit in such a case is for the benefit of the buyer, and merely means that he cannot be sued till the term of credit has expired.

Under this rule, which it was the design of the Virginia statute partially at least to abrogate, the jury, as Judge Tucker observed, *could not* allow interest; so that between the English rule denying interest altogether, on the one hand, and the rule in a few of the American States allowing it as of right, on the other, the rule in Virginia at the present day occupies a middle ground; that is to say, in the absence of an agreement express or implied, the matter of interest is left to the discretion of the jury.

It is submitted that the doctrine, maintained and adhered to by eminent English judges, that the *mere fact* of selling goods to be paid for at a certain day does not evince an intention of the parties that interest shall run after the term of credit has expired, is more consonant with reason than the rule which, inferring such intention, gives interest as of right. The latter rule would seem to be based upon a strained and arbitrary, rather than a reasonable, interpretation of the transaction, and if applied to a case the facts and circumstances of which are like those of the present case, the result would be, we repeat, to impose upon the parties a contract which, as a matter of fact, they almost certainly never contemplated. Besides, why should *the law* imply a promise to pay interest in such a case, any more than in the case of money obtained by fraud or imposition, as *in the Sanborn case* (135 U. S.), for instance? Upon principles of natural justice, what stronger claim is there to interest in the one case than in the other?

Speaking of an action on *assumpsits* of the latter kind, Blackstone, with whom all the authorities agree, says: "This is a very extensive and beneficial remedy, applicable to almost every case where the defendant has received money which *ex aequo et bono* he ought to refund. It lies for money paid by mistake, or on a consideration which happens to fail, or through imposition, extortion, or op-

pression, or where any undue advantage is taken of the plaintiff's situation." 3 Bl. Comm. 162. And yet while the law in such cases implies a promise to pay the principal, the matter of interest, according to *the Sanborn* and other cases hereinbefore referred to, is left, as the Virginia statute leaves it, to the discretion of the jury.

If, then, in a case like the present interest is not recoverable as of right, as a substantive part of the debt, but is matter of discretion, allowable as damages for *default of the debtor*, (*United States* v. *Sherman*, 98 U. S. 565, 567-8), the next question is, Can default, as a legal proposition, be attributed to the debtor under the circumstances of the present case?

(2) *Railway Company not in default during period of receivership.*

The nature of the alleged debt, and the object or scope of the suit, are features of the present case which distinguish it from the cases relied on by appellant in this connection. As to the debt, apart from what has been said as to its not carrying interest as matter of law, it is not being asserted as an equitable claim for supplies furnished, under the doctrine of *Fosdick* v. *Schall*, but as a prior statutory lien; and as to the suit, it is not a general creditors' suit, or one to subject the property of the debtor company to the satisfaction of liens thereon of different priorities.

Attention has been called to the pleadings, and, as we have seen, the insolvency of the railway company was a fact alleged and admitted. It was admitted in the answer to the bill, in which it was averred, as well as in the cross-bill, and was fully and distinctly averred in the bill of foreclosure. There was not a suggestion to the contrary. The real object of the bill filed in the original suit was to

secure, in the interest of the public, as well as of the creditors and stockholders, the protection of the court until a re-organization could be effected, and the bill of foreclosure, to which the only creditors made parties were certain junior mortgagees, did not go beyond the scope of the ordinary bill of foreclosure seeking merely the sale of the equity of redemption. Not only were no prior incumbrancers made parties, but none were permitted by the court to intervene or become parties. In the decree appointing the receivers the railway company was ordered to surrender possession of all its property, and was enjoined from in any way interfering with it. The decree was obeyed, and the property of the debtor, or the means of paying its debts, having passed to the receivers of the court, to be used and operated under the control of the court, or, in other words, the property having passed *in custodia legis*, the delay in respect of appellant's claim (if it has not been fully discharged) was, during the period in question, the act of the law, and consequently not the result of default on the part of the debtor.

No point was made in the circuit court as to the bill in the original suit having been filed by the mortgagor, the railway company, and, as appellees submit, had such a point been made it could not have been successfully made. But, be that as it may, the action of the court in appointing receivers cannot be challenged on this appeal, and the same effect is to be given to what was done in the suit as if the bill had been filed, as was the foreclosure bill, by the representative of mortgage creditors. *Quincy &c. Railroad Co.* v. *Humphreys*, 145 U. S. 82.

"Upon the ground that interest is not due when the debtor is not in default, and has not had the use of the claimant's money, it is a settled principle that when the payment of a debt, and the use of a fund, are prevented

by the interposition of law, or the act of the creditor, interest does not accrue during the continuance of such prevention." 1 Am. Lead Cas. (5th ed.) 642.

The rule is frequently applied in the case of garnishees required to bring money into court, and when money is thus brought into court, the garnishee is not chargeable with interest while he is deprived of the use of the money, and is restrained from payment. *Mattingly* v. *Boyd*, 20 How. 128. As the court said in *Hymely* v. *Rose*, 5 Cranch 313, "If money remains in possession of the court it carries no interest." And in *Osborn* v. *United States Bank*, 9 Wheat. 738, 837, the ground upon which the claim for interest in that case was denied was thus stated by Chief Justice Marshall:

> "The court itself interposed and forbade the person, in whose possession the property was to make any use of it. Its order having been obeyed, places the defendant in the same situation, so far as respects interest, as if the court had taken the property into its own custody. The defendant, in obeying the mandate of the court, becomes its instrument, as entirely as the clerk of the court would have been had the property been placed in his hands. It does not appear reasonable that a decree which proceeds upon the idea that the injunction of the court was valid ought to direct interest to be paid on the money which that injunction restrained the defendant from using."

Thomas v. *Western Car Co.*, 149 U. S. 95, 116, recognizes the same principle. It is unnecessary to stop to minutely examine the facts and circumstances of that case, in regard to which so much has been said. Suffice it to say it plainly

recognizes the principle for which appellees contend. "As a general rule," said the court in that case, "after property of an insolvent passes into the hands of a receiver, or of an assignee in insolvency, interest is not allowed on the claims against the funds. The delay in distribution is the act of the law," etc.

Nor is *Southern Railway Co.* v. *Carnegie Steel Co.*, 176 U. S. 257, relied on by appellant, in conflict with the decree of the circuit court in the present case. That case widely differs from the present. In the first place, it was a case of contractual interest, the debt being evidenced by interest-bearing commercial paper (76 Fed. Rep., p. 494; 176 U. S., p. 290) given pursuant to the contract when the supplies were purchased; and, in the next place, the debt was asserted as an equitable one, under the doctrine of *Fosdick* v. *Schall*, the claimant, moreover, being permitted to intervene and to become a party defendant in the consolidated cause. This court was careful to say that no invariable rule in regard to such claims had been laid down, and that each case must depend upon its special facts. The claim in that case, which would seem to have been an exceptionally meritorious one, was allowed in full, *though the question of interest was not discussed, nor even mentioned, in the opinion of the court.* As interest was a part of the debt, its allowance has no bearing as authority on the present case. We take it, however, that in the case of a supply claim, even where interest is not expressly contracted for, a court of equity may, in the exercise of its discretion in a receivership suit, allow interest as well as principal when the facts show that such preference ought to be given in the application of the beneficent equitable doctrine above mentioned.

These remarks as well apply to the cases in the Circuit Court of Appeals for the Fourth Circuit, reported in 76

Federal Reporter, and cited in the appellant's brief, viz: *Southern Railway Co.* v. *Carnegie Steel Co.; Same* v. *Am. Break Co.; Same* v. *Adams*, and *Same* v. *Tillett.*

The cases of *Central Trust Co.* v. *Condon* (C. C. A.), 67 Fed. Rep. 84; *Richmond & I. Const. Co.* v. *Richmond, &c. Co.* (C. C. A.), 68 Fed. Rep. 105; *Jourolmon* v. *Ewing*, (C. C. A.), 85 Fed. Rep 103, mainly relied on by appellant, are not in point, as a glance at them will show.

The first mentioned case was a foreclosure suit consolidated with a general creditors' suit, which latter suit was brought by lien creditors to establish their liens against a certain railroad, to marshal the liens, and to sell the road to satisfy the liens, and a receiver was appointed. All material-men having statutory liens or other claims against the railroad were, so far as known, made parties, (p. 88). Numerous lien creditors were allowed to file intervening petitions, and were admitted as parties to the suit, (p. 86). It was held that the sub-contractors who had perfected statutory liens, which were superior to the mortgages, were entitled to interest, on the ground that as the object of the suit was "the distribution of the proceeds of a common security between liens of different priorities," there was no principle known to the court by which interest could be stopped on the amount of the superior lien until its satisfaction, (p. 98).

Richmond & I. Const. Co. v. *Richmond, &c. Co., supra,* was in its essential features, so far as the present case is concerned, like *the Condon case.* It was a contest between lien creditors of a railroad company, *i. e.*, between sub-contractors having statutory liens, on the one hand, and mortgage bondholders, on the other. The litigation was commenced by the filing of a bill of foreclosure, to which various persons claiming to be creditors of the railroad company, and to have priority over the mortgagees, were

made defendants. Those lien creditors who were not made defendants to the bill were allowed to become parties by intervention; so that the case, like *the Condon case*, was, in effect, a suit to ascertain and marshal liens, and to sell the property to satisfy the liens, (68 Fed. Rep., pp. 92, 93), and, following the ruling in that case, the prior lienors were held entitled to interest.

The Jourolmon case, supra, besides being a case of contractual interest, was a general creditors' suit to wind up an insolvent corporation, to which all creditors of the corporation were made parties, the suit being consolidated with a foreclosure suit (80 Fed. Rep., p. 606). Interest was allowed as in the two last cases above mentioned.

First National Bank v. *Ewing* (C. C. A.), 103 Fed. Rep. 168, 171, cited by appellant, belongs to the same class of cases, there the object of the suit being, among other things, to obtain "the condemnation and sale of the railway property as a trust fund for equitable administration and distribution." The claim in that case was for taxes, which, according to an applicable statute, carried interest.

In *State Trust Co.* v. *Kansas City, &c. Ry. Co.*, 129 Fed. Rep. 455, which was a foreclosure suit, interest on a certain claim for supplies furnished the railroad company prior to the receivership was denied—the claim being asserted as a preferential equitable lien—and Judge Phillips in his opinion denying interest accruing after the receivership began, said: "No other claimant has been allowed interest on its claim, and the general rule is not to allow such interest"; citing *Thomas* v. *Western Car Co.*

Similar decisions by the courts at *nisi prius* are numerous.

In the case at bar a vast number of supply claims were paid as preferential equitable claims, but in no case was interest paid which accrued after the receivership began. On some obligations, it is true, interest accruing during

the receivership was paid, such as interest on the company's first mortgage bonds, on its underlying divisional bonds, on the funded and many of the floating obligations of the company, etc., and much, consequently, is said in appellant's brief on the subject of diversion. But as appellant occupies the position, not of a claimant of a preferential equitable lien, but that of a prior statutory lienor, seeking to enforce its lien in this suit, the question of diversion, it is submitted, is not relevant to this controversy. Appellant had no right to enforce such a lien in this suit before the decree providing for ending the receivership was entered, and no such right, as we shall presently see, was given by that decree.

Appellant insists that the rule recognized in *the Thomas case,* has no application to the present case, on the ground that the railway company was not insolvent.

That the insolvency of the company at the institution of the suit is an incontrovertible fact appears from the reference already made to the pleadings, and the certificate of the Circuit Court of Appeals is based upon that idea. It is insisted, however, that before the termination of the receivership the company became solvent; but at what point of time this change in its financial condition occurred is not indicated. It is submitted that the status of the company in this particular must be held to have been the same throughout the receivership, since as long as the receivership lasted the company was deprived of the use of its property, which was no less *in custodia legis* one day of the receivership than another. Further, as a matter of fact, it is a mistake to suppose that the plan of reorganization, or the decree of the court approving the plan, recognized that the company was solvent.

(3) *If appellant's lien was not fully discharged by the*

payment of the principal, it, or what remains of it, is not enforceable in this suit.

As appellant is *seeking to enforce a prior statutory lien*, in a suit that is not a creditors' suit or anything of the sort, the receivers might well have refused to pay the principal of the debt; they could not have been compelled to do so. As, however, the debt was contracted for supplies, the receivers generously paid the principal, no interest in any point of view having accrued prior to the receivership, it being understood at the time that the acceptance by the appellant of the principal was without prejudice to its asserted claim for interest accruing after the receivership began.

That appellant, as a prior encumbrancer, had no right to enforce its lien or any remnant of it in a suit of this sort would seem to be very clear. According to the rule established by the decisions of this court, a foreclosing junior mortgagee, seeking only the sale of the equity of redemption, as in the present case, has no right, under ordinary circumstances, to bring in a prior mortgagee or other prior encumbrancer, and if brought in, such prior encumbrancer may object and be relieved from the suit with costs. And, as in such a case no relief as against prior encumbrancers is sought it goes without saying that their rights cannot be injuriously affected by the decree. *Jerome* v. *McCarter*, 94 U. S. 734; *Woodworth* v. *Blair*, 112 U. S. 8.

It is therefore not less well settled that from the action of the court refusing leave to a prior lienor to intervene in such a suit there is no appeal; and as the order refusing such leave is not final in its character, it leaves the party denied the privilege of intervening at full liberty to assert his rights, if any, in any appropriate form of proceeding. *Ex parte Cutting*, 94 U. S. 14; *Credits Commutation Co.* v. *United States*, 177 U. S. 311; *Re Metropolitan Railway Receivership*, 208 U. S. 90, 106.

In *Woodworth* v. *Blair*, above cited, which was a suit to foreclose a railway mortgage, a prior mortgagee filed an intervening petition, setting up the prior mortgage, and praying that the amount thereof be ordered to be paid out of any funds in the hands of the receiver, or out of the proceeds of sale under any decree to be rendered in the cause. The circuit court refused leave to intervene, and dismissed the petition, but without prejudice, and on appeal to this court the decree was affirmed. This court, after adverting to the above mentioned rule in regard to parties, and citing *Jerome* v. *McCarter*, added:

> "In a suit to foreclose a mortgage of the whole railroad franchise and property of a railroad corporation, it would often produce great delay and embarrassment to undertake to determine the validity and extent of all prior liens and encumbrances on specific parts of the corporate property before entering a final decree. The course pursued by the circuit court in the present case, dismissing the intervening petition of the appellant, without prejudice, and ordering a foreclosure by sale, subject to her mortgage, of the entire railroad and other property included in the railroad mortgages to foreclose which the principal suit had been brought, judicially and effectively secures the rights of all parties."

II.

No Right to Recover Interest or to Afterwards File a Petition Was Given Appellant by the Decree of October 18, 1909, Providing for Terminating the Receivership.

The decree of October 18, 1909, did not recognize the solvency of the railway company, but merely approved what

was called a plan of adjustment of the finances of the company, and provided for ending the receivership at a certain time, in the then near future. The plan, among other things, provided for the execution of two new mortgages,—the first called a refunding mortgage, the second, an adjustment mortgage, under each of which a large amount of bonds of the company were to be issued (and were afterwards issued) with which to cancel certain specified indebtedness of the company. Under the first mortgage an issue of bonds to an amount not exceeding $125,000,000 was authorized, and under the second an issue not exceeding $25,000,000 was authorized. The plan also set forth very clearly the indebtedness of the company for which it was desired to make provision, viz: (1) the overdue interest on the company's first mortgage four per cent bonds; (2) $700,000 face value of its two-year notes; (3) receivers' certificates and charges of the receivership; and (4) the company's floating indebtedness, which, as explained, consisted of *certain notes secured by collaterals.*

The company of course was to continue liable for all its just debts and obligations, but no provision for cancelling its indebtedness was made in the plan of adjustment other than is above indicated. As to its indebtedness for which provision was not made in the plan, that was to remain just as though there had been no receivership.

The decree approving the plan did not mean to extend the liability of the company, or to enlarge the scope of the pleadings. No lienor, for example, not having a right to enforce his lien while the receivership was pending had a right under the decree to come in afterwards by petition and enforce it. Such was not the intention of the decree; nor is there in it any language warranting such a construction. On the contrary, the indebtedness of the company which would constitute a foundation for filing a petition

after the termination of the receivership was such as would continue *"to the same extent* and with the same priorities *as though the receivership had continued,"* etc.

The circuit court had repeatedly held that a lien such as the appellant's lien was not enforceable in the suit.

Beyond this the decree did not go, and it is respectfully submitted that the question certified by the Circuit Court of Appeals should be answered in the negative.

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